Submission to the Senate Legal and Constitutional References and Legislation Committee

Inquiry into the Administrative Appeals Amendment Bill 2004

21 January 2005

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Summary of Recommendations

Recommendation 1:
That the proposed amendment at Schedule 1, clause 15, to reduce the qualification requirements for the position of President, be rejected.

Recommendation 2:
That the proposed amendment at Schedule 1, clause 21, to restrict the terms of appointment for all members to up to seven years, be rejected.

Recommendation 3:
That the proposed amendment at Schedule 1, clause 36, to allow the Minister to assign members to Divisions of the Tribunal, be rejected.

Recommendation 4:
That the proposed amendment in Schedule 1, clause 66, to expand the powers of the President to direct that a member not continue to take part in proceedings if it is 'in the interests of justice' and to reconstitute the Tribunal if it is 'in the interests of achieving the expeditious and efficient conduct of the proceeding', be rejected.

Recommendation 5:
That the proposed amendment at Schedule 1, clause 95, to allow the Tribunal to request a person applying for review by the Tribunal to amend the statement setting out their reasons for lodging a review, be rejected.

Recommendation 6:
That the proposed amendment at Schedule 1, clause 226, to repeal the current provision that requires that the Tribunal must be constituted by a Presidential Member alone when conducting a review of certain migration decisions, be rejected.

Introduction

About PIAC

The Public Interest Advocacy Centre ('**PIAC**') is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision-making.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, community legal centres, private law firms, professional associations, academics, experts, industry and unions to achieve its goals. PIAC works on public interest issues at both a NSW and national level.

PIAC was established in 1982 as an initiative of the (then) Law Foundation of New South Wales, with the support of the NSW Legal Aid Commission. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program.

PIAC's experience of the Tribunal

PIAC has acted for numerous clients who have had matters before the Administrative Appeals Tribunal ('**the Tribunal**'). In particular PIAC's recent experience has been in Freedom of Information and deportation matters. In addition, PIAC has extensive experience in administrative law matters in the NSW Administrative Decisions Tribunal ('**the ADT**').

PIAC also has extensive policy experience in the development and review of administrative appeals structure. In particular, PIAC was a proponent and advisor to the NSW State Government in the establishment of the ADT.

General Comments on the Bill

The current Acting President of the Tribunal, Justice Garry Downes, rightly describes the Tribunal as:

> … a unique and forward thinking system instituted by the governments of Australia to provide the highest quality in decision making in areas of administration.[1]

Since its inception, the Tribunal has provided an efficient, professional, affordable, and—above all—independent avenue of review of Government decisions. The Tribunal, like all organisations, must of course adapt to the changing needs of our society. However, as recognised by the Australian Law Reform Commission ('**the ALRC**'), the Tribunal, as a member of the Federal Civil Justice system, is not in crisis.[2]

PIAC has therefore reviewed the Administrative Appeals Amendment Bill 2004 ('**the Bill'**) from the perspective of whether the proposed amendments will enhance the capacity of the

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1 The Hon Justice Garry Downes, 'Tribunals in Australia: Their Roles and Responsibility' (2004) 84 *Reform*.

2 Australian Law Reform Commission (2000) *Managing Justice: A Review Of The Federal Civil Justice System,* Australian Law Reform Commission Report, Report No 89 at 69.

Tribunal to meet the changing needs of our society. PIAC concludes that some amendments will indeed do that. For example, clause 110 of Schedule 1 of the Bill, which gives the President of the Tribunal ('**the President**') power to authorise Conference Registrars to issue directions as to the procedure to be followed at or in connection with the hearing of a proceeding, has the potential to enhance efficient case management.

PIAC has, however, identified a number of amendments, that it believes will diminish the capacity of the Tribunal to perform its duties. The amendments that PIAC has particularly identified relate to the *Administrative Appeals Tribunal Act 1975* and the *Migration Act 1950*.

Amendments to the *Administrative Appeals Tribunal Act 1975*

PIAC's concerns with the amendments proposed to the *Administrative Appeals Tribunal Act 1975* ('**the AAT Act**') are that they will:

- diminish the efficacy and status of the Tribunal;
- diminish the independence of the Tribunal; and
- impose additional burdens on unrepresented clients.

Schedule 1, clause 15

This amendment proposes to relax the qualification requirements for the appointment of the President from a requirement that the person be a Judge of the Federal Court to a requirement that a person be a Judge of the Federal Court, a Federal Magistrate, a former Judge, a former Federal Magistrate, or a legal practitioner enrolled for at least five years in an Australian jurisdiction.

PIAC's concerns about this amendment arise from the potential for the appointment as President of a person who has significantly less knowledge, experience and standing than past and current Presidents. Such an appointment could lead to a reduction in the efficacy and status of the Tribunal.

The President of the Tribunal has, and will continue to have, extensive power over, and responsibility for the organisation, structure and operation of the Tribunal, all of which impact on the Tribunal's effectiveness. In short, a great deal of the Tribunal's efficacy relies upon the attributes of the President. The President's broad powers and responsibilities necessitate that the incumbent be a person of extensive legal and management experience. A Federal Court Judge is the ideal candidate as they have considerable experience as practitioners and adjudicators, and in managing proceedings.

In addition to the depth of knowledge and experience that Federal Court Judges have, their positions have high standing and recognition in the legal community and the community more broadly. Accordingly, their appointment as President of the Tribunal gives the Tribunal greater status and authority.

This level of knowledge, experience and status may not be present in future candidates if this amendment is passed. Firstly, this amendment downgrades the level of required legal experience from the current number of years experience that a Federal Court Judge has, to as little as five years' legal experience. Second, this amendment would also allow the appointment to the position of President of a person who has no experience of Federal laws, as

all it requires, as a minimum requirement, is a person who has been enrolled as a legal practitioner in a state jurisdiction. Third, the appointment of a legal practitioner, instead of a Federal Court Judge, would have a significant and detrimental effect on the standing and authority of the Tribunal.

PIAC therefore opposes the relaxing of the qualification requirement as it would potentially diminish the efficacy and status of the Tribunal.

Recommendation 1:
That the proposed amendment at Schedule 1, clause 15, to reduce the qualification requirements for the position of President, be rejected.

Schedule 1, clause 21

This amendment proposes to restrict the term of appointment for all members to up to a maximum of seven years, with eligibility for re-appointment. As it now stands, a Presidential member who is a Judge holds office until he or she attains the age of 70 years or ceases (before attaining that age) to be a Judge. Full-time Deputy Presidents are appointed to the age of 70, and full-time Senior Members to the age of 65. Members are appointed for maximum terms of seven years, and are eligible for re-appointment.

The independence, or at very least the perception of independence, of the Tribunal is under threat from this amendment. Indeed, the ALRC said of the independence of Federal tribunals:

> While review tribunals are part of the executive arm of government, tribunal members must bring the same quality of independent thought and decision making to their task as do judges. It is crucial that members of the community feel confident that tribunal members are competent and of the highest integrity, and that they perform their duties free from undue government or other influence.[3]

Tribunals lack the constitutional, historical and traditional protections enjoyed by the Courts. Accordingly, the capacity of and temptation for governments to use powers including powers of appointment to influence the result in external review processes is high. To ensure appropriate review, Government influence should be confined to the presentation of rational arguments before the Tribunal. The current tenure provisions are, in PIAC's opinion, best practice as they offer the assurance of independent.

Recommendation 2:
That the proposed amendment at Schedule 1, clause 21, to restrict the terms of appointment for all members to up to seven years, be rejected.

Schedule 1, clause 36

This amendment proposes to allow the Minister to assign members to Divisions of the Tribunal, rather than this power residing with the Governor-General.

As stated above, the independence, both actual and perceived, of the Tribunal is diminished by this amendment. The independence of a statutory body that reviews decisions of government is a vital characteristic, and any steps to remove that independence, even if it is only the

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[3] Australian Law Reform Commission, above n2 at 179.

perception of independence, must only be taken when there are compelling reasons. There are currently no such reasons.

Recommendation 3:
That the proposed amendment at Schedule 1, clause 36, to allow the Minister to assign members to Divisions of the Tribunal, be rejected.

Schedule 1, clause 66

This amendment proposes to expand the powers of the President to direct that a member not continue to take part in proceedings if it is 'in the interests of justice', and to reconstitute the Tribunal if it is 'in the interests of achieving the expeditious and efficient conduct of the proceeding'.

In PIAC's opinion, the Tribunal should only be reconstituted where there is a legal necessity. The President already has sufficient power to deal with such circumstances. Further, if the Tribunal had to be reconstituted, the interests of justice could only be served if the new Tribunal reheard the entire proceedings to the Tribunal can only make a fully informed decision it if had heard all of the evidence and come to its conclusion at the veracity of evidence and the credibility of witnesses. This would clearly involve considerable expense and lead to a delay in the proceedings.

Recommendation 4:
That the proposed amendment in Schedule 1, clause 66, to expand the powers of the President to direct that a member not continue to take part in proceedings if it is 'in the interests of justice' and to reconstitute the Tribunal if it is 'in the interests of achieving the expeditious and efficient conduct of the proceeding', be rejected.

Schedule 1, clause 95

This amendment proposes to allow the Tribunal to request a person applying for review by the Tribunal to amend the statement setting out their reasons for lodging a review. In relation to clause 95, the Explanatory Memorandum states:

> This provision is made to overcome the practise of applicants submitting in their statement of reasons that there was 'error in fact and law' without further substantiation, particularly where the applicant has legal representation.

The Tribunal was designed to provide an accessible forum. In many cases, unrepresented applicants bring matters to the Tribunal. This provision will place a barrier in their quest to have a Government decision reviewed. While PIAC understands the value of the provision in relation to applicants who have legal representation, unrepresented applicants may not have the capacity to clearly articulate the reasons for the review. Indeed, the very rationale for the power, that the statement of reasons is not sufficiently particularised, is mostly likely the result of the lack of representation. If the Tribunal requests better particularisation, an unrepresented applicant will not be in a position to comply and the new provision would place an additional burden on applicants who are least able to respond to it. If the amendment is aimed at represented applicants, as suggested in the Explanatory Memorandum then the amendment could be tailored to refer to applicants with legal representation only. PIAC recommends that it be rejected as it stands.

PIAC notes that section 42B of the AAT Act already empowers the Tribunal to dismiss matters that are vexatious.

Recommendation 5:
That the proposed amendment at Schedule 1, clause 95, to allow the Tribunal to request a person applying for review by the Tribunal to amend the statement setting out their reasons for lodging a review, be rejected.

Amendments to the *Migration Act 1958*

Schedule 1, Clause 226

This amendment proposes to amend subsection 500(5) of the *Migration Act 1958* ('**the Migration Act**') by repealing the current provision that mandates that the Tribunal must be constituted by a Presidential Member alone when conducting a review of certain migration decisions. The new subsection 500(5) of the Migration Act does not require the Tribunal to be constituted by a Presidential Member alone.

PIAC has two concerns about this amendment. Firstly, the matters referred to in the Migration Act that would be considered under this provision are significant. They include:

- the validity of a Ministerial order to deport a non-citizen convicted of a crime;
- the refusal of a visa on character grounds; and
- the refusal of a protection visa in specific circumstances.

PIAC submits that these matters all require serious consideration from a highly skilled adjudicator. Accordingly, these are matters that should be heard by a Presidential member.

Second, even if the amendment is considered appropriate, it is unduly legalistic and may itself become the subject of a legal challenge to the President's decision on who will hear the matter. This may be the case as the amendment gives the President a discretion that must be applied by considering criteria set out in the section. If an applicant believes that the appointed Tribunal lacks the expertise required by the section, they may seek to challenge the President's decision on the grounds that it did not lawfully comply with the section. This would lead to further proceedings and delay of the Tribunal proceedings.

The effect of the amendment is, therefore, counter to the objects of the AAT Act and the amendment is unnecessary as the President already has sufficient power in section 20 to arrange the business of the Tribunal and that section gives the President sufficient guidance for the use of the discretion.[4] PIAC, therefore, recommends that the provision be rejected.

Recommendation 6:
That the proposed amendment at Schedule 1, clause 226, to repeal the current provision that requires that the Tribunal must be constituted by a Presidential Member alone when conducting a review of certain migration decisions, be rejected.

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4 Sub-section 20(3) of the AAT Act.